No. 95-856

In The

Supreme Court of the United States

October Term, 1995

WILLIAM J. JANKLOW, GOVERNOR AND
MARK W. BARNETT, ATTORNEY GENERAL,
IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

PLANNED PARENTHOOD, SIOUX FALLS CLINIC,
BUCK J. WILLIAMS, M.D., AND
WOMEN'S MEDICAL SERVICES, P.C.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Contrary to the view of the Respondents, this case presents the opportunity for this Court to decide three important, and unanswered, legal questions. The first question is whether a one-parent notice statute is required to contain a judicial bypass. The second question is whether *United States v. Salerno*, 481 U.S. 739 (1987), continues to apply to facial challenges to abortion laws or whether that standard has been displaced, *sub silentio*, by the "undue burden" standard of the Joint Opinion in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992). The third question is whether and how the "undue burden" standard can be applied in a principled and neutral fashion, particularly that part of the standard which requires courts to determine whether a "large fraction" of the affected class is subject to an "undue burden." The authors of the Joint Opinion recognized that the "undue burden" standard would generate the "need for" further review by this Court, *Casey*, 112 S.Ct. at 2809, but for almost four years state legislatures and courts have struggled to discern the meaning and implications of this standard without any further clarification or guidance from this Court.

ARGUMENT

I

RESPONDENTS HAVE CONCEDED THAT THE EIGHTH CIRCUIT COURT OF APPEALS AND THE FIFTH CIRCUIT COURT OF APPEALS HAVE RENDERED CONFLICTING DECISIONS ON WHETHER *UNITED STATES v. SALERNO* CONTINUES TO APPLY TO FACIAL CHALLENGES TO ABORTION LAWS.

The State's Petition argues that a grant of certiorari is appropriate because the Fifth Circuit decision in *Barnes v. Moore*, 970 F.2d 12, 14 n.2 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 656 (1992) conflicts with the decision of the Eighth Circuit Court of Appeals in this litigation on the issue of whether the "facial challenge" rule of *United States v. Salerno*, 481 U.S. 739 (1987) continues to apply to facial challenges to abortion laws. Planned Parenthood grudgingly agrees that such a conflict exists. Respondents' Brief (R.B.) at 4 n.2.

Respondents nonetheless contend that "consistency" would be served by denying certiorari but this goal is hardly met by withholding guidance to the states and lower courts on this issue. We also note the fallacy of Respondents' argument that, if the facial challenge rule is not found to have been overruled, abortion rights will regularly be allowed to "evaporate." Respondents thus ignore the efficacy of the "as applied" challenge and the ability of state and federal courts to grant emergency relief in appropriate situations.

II

THIS COURT SHOULD SETTLE THE QUESTION OF WHETHER A JUDICIAL BYPASS IS REQUIRED AS A COMPONENT OF A SINGLE-PARENT NOTICE STATUTE.

Respondents do not deny that this Court has not decided the question of whether the single-parent notice statute must contain a judicial bypass mechanism. *See Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 510 (1990) (*Akron II*).

Moreover, the critical elements of South Dakota's statute indicate that it is, in fact, constitutional. In particular, South Dakota's statute passes constitutional muster because it requires only notice, and not consent, and to only one parent. Further, the statute exempts even from this requirement a very broadly defined class of "abused and neglected" minors. *See* App. 84-85. Virtually all "best interest" minors are covered by the "abuse and neglect" exception and the notification of one parent by a "mature minor" does not, we contend, unconstitutionally interfere with or, alternatively, "unduly burden" her right to an abortion.

Respondents nonetheless seek to persuade this Court to deny certiorari on the grounds that the question cannot be important because only South Dakota has enacted a single-parent notice statute with no judicial bypass. Respondents are, however, well aware that many state legislatures are carefully watching this case and that it is of "national importance."

III

THE STANDARD OF REVIEW FOR ABORTION LEGISLATION SHOULD BE DEFINITIVELY ARTICULATED.

Relying on the Joint Opinion in *Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992), Respondents assert that this Court has established that all abortion laws must be adjudged under the "undue burden" standard. But only three Justices subscribed fully to the critical portion of the Joint Opinion. Moreover, one of those Justices at least arguably drew into question his continued adherence to the "undue burden" standard by failing to join in the concurrence in *Fargo Women's Health Organization v. Schafer*, 113 S.Ct. 1668 (1993) (O'Connor and Souter, JJ., concurring in Memorandum Decision).

Casey, moreover, indicates that the "undue burden" analysis cannot be applied to parental notice or consent statutes. Under the "undue burden analysis," at "stake is the woman's right to make the ultimate decision," *Casey*, 112 S.Ct. at 2821, and the state may not prohibit any woman from obtaining an abortion before viability. *Id.* But *Casey* itself recognized the constitutionality of a statute which provides that if neither parent nor a judge consents to a minor's abortion, the minor will not be able to obtain an abortion. *Casey*, 112 S.Ct. at 2832. The "undue burden" analysis, therefore, cannot logically be applicable to parental consent or notice statutes.

Not only does *Casey* itself belie Respondents' argument, but *Hodgson v. Minnesota*, 497 U.S. 417 (1990) strongly indicates that the "rational relationship" test should be used in testing parental notice statutes. *See id.*,

497 U.S. at 490, 496, 500-501 (Kennedy, J., Rehnquist, C.J., White and Scalia, JJ.); *id.*, 497 U.S. at 450 (Stevens, J.); *id.*, 497 U.S. at 459 (O'Connor, J.).

Acceptance of certiorari in this case would allow the Court to clarify the application of the standard of review both with respect to abortion statutes generally and with regard to parental notice statutes in particular.

IV

THE COURT OF APPEALS MISAPPLIED THIS COURT'S DECISIONS WITH REGARD TO NOTICE STATUTES GENERALLY AND SINGLE-PARENT NOTICE STATUTES.

A. The court of appeals incorrectly found South Dakota's notice statute to be the legal equivalent of a consent statute.

The court below premised its decision on the theory that a notice statute was the rough equivalent of a consent statute. *See* App. 16, *id.* at 17. This treatment, however, is legally erroneous under *Akron II*, 497 U.S. at 510-511, and merits reversal by this Court.

B. The court of appeals incorrectly found that South Dakota's one-parent notice statute was equivalent to a two-parent notice statute.

This Court's opinions in *Hodgson* clarify that a one-parent notice is not legally equivalent to a two-parent notice statute. *See Hodgson*, 497 U.S. at 450-452; *id.*, 497 U.S. at 459 (O'Connor, J., concurring). Nor did the evidence in this case justify equivalent treatment. We note,

particularly, that Respondents cite no evidence that any child existed within South Dakota who could not contact a second parent so as to give notice. See, R.B. 8-9. Therefore, the treatment by the court below of South Dakota's one-parent notice as equivalent to a two-parent notice statute, see, App. 22-25; App. 24 at n.10, was legally erroneous.[1]

V

THE COURT OF APPEALS DID NOT "FAITHFULLY FOLLOW" THIS COURT'S "UNDUE BURDEN" ANALYSIS.

Respondents assert that the court below properly applied the "undue burden" test as articulated by the Court. There has, however, been but one decision of this Court applying that standard, *Casey* itself, and this case demonstrates that the courts are in need of additional guidance from this Court as to its application.

A. The court of appeals misapplied the "undue burden" standard with regard to mature minors.

The Joint Opinion in *Casey* made it abundantly clear that the "undue burden" analysis is not a mechanical one and must be carefully applied. The Joint Opinion also

[1] The court justified its approach by finding that 18 percent of minors lived in one-parent homes. App. 24 at n.10. This says virtually nothing about whether the second parent could be notified, notwithstanding the court's conclusory language to the contrary.

carefully distinguished the *spousal* relationship from the *parent-child* relationship. *Casey*, 112 S.Ct. at 2830, 2831. The court of appeals thus misapplied the "undue burden" standard when it treated the single-parent notice statute as equivalent to the spousal notification requirement. App. at 16-17.[2]

B. Better protections are available for abuse victims in South Dakota than in judicial bypass states.

Respondents are clearly unable to answer South Dakota's claim that its statute better provides for abuse victims than does an exclusively judicial bypass system. In South Dakota, the abuse victim can notify the doctor of the abuse, which is plainly *less* of a burden on a minor than reporting abuse to a judge in a judicial bypass proceeding. *See, e.g.*, Affidavit of Dr. Elkind at ¶ 5. Respondents argue, in defense of the decision of the court of appeals, that a mature minor could avoid telling a judge of sexual abuse by demonstrating that she is mature. Respondents also say that a "best interest" minor can demonstrate that an abortion is "in her best interests for some other reason" than the sexual abuse and so avoid telling a judge of the sexual abuse. R.B. at 10 n.6. Respondents thus tell the Court, in effect, that the "mature" and "best interest" minors should be able to conceal from a court their primary reasons for obtaining their abortions (i.e. sexual abuse), that the state and the

[2] Contrary to the Respondents' implication, R.B. at 9, this Court has never held that a mature minor has a constitutional right to refuse to notify one parent about an intended abortion.

court should cooperate in that concealment, that the abortions should be allowed, and that both the "mature" and "best interest" minors should then be returned to their homes where the abuse occurred. This result is not demanded by the United States Constitution.

C. The lower courts need the guidance of this Court in determining when a "large fraction" of minors are unduly burdened.

The court of appeals found that a "large fraction" of minors were "unduly burdened" by the state single-parent notice statute, *see* App. 25, but it is not possible to determine how the existence of the "large fraction" was ascertained, or in particular, what the court of appeals determined to be the numerator and denominator of the fraction.[3] It appears that the court simply made its "best guess," which, we assert, is a constitutionally inadequate basis on which to strike a state law. The State submits that the lower courts need the guidance of this Court in applying this test in a principled manner.

D. The statutory arrangement in South Dakota protects the confidentiality of the minor's abortion.

Respondents contend that the construction by the court of appeals of the South Dakota statutes regarding

[3] We note that Respondent Williams reported that only one pregnancy was aborted as a result of rape or incest on minors under 17 between 1986 and 1993. Affidavit of Doris J. Donner, Ex. 3.

confidentiality should be sustained, citing *Frisby v. Schultz*, 487 U.S. 474 (1988). *Frisby*, however, clearly contemplates examination of the question by two lower courts; in our case, only the court of appeals examined the issue. Moreover, the strained construction of state law by the court of appeals, which yielded a finding of an unconstitutional "undue burden," is to be avoided under the cases of this Court, including *Frisby*, 487 U.S. at 483. *See also, Webster v. Reproductive Health Services*, 492 U.S. 490, 514 (1989) (Rehnquist, C.J.).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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January 1996